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# PROMISE: THE NEGLECTED OBLIGATION IN EUROPEAN PRIVATE LAW

## I. INTRODUCTION: THE LEGAL HISTORY OF PROMISE

For many centuries, the unilateral promise held a central place in the obligational theory of European private law. That centrality was assured by natural law theory, with its emphasis upon the virtue of promise keeping (or ‘truth telling’, as more anciently it had been described),<sup>1</sup> Scripture,<sup>2</sup> the Canon law,<sup>3</sup> and Scholastic legal philosophy.<sup>4</sup> Yet, by the close of the 17<sup>th</sup> century, natural law theory had reached its zenith, and the new century brought with it a rational scepticism that was to unseat natural law theory and topple promise from its primary position within the law of obligations. Promise keeping was no longer thought to be an innate feature of human nature, but simply a sentimental explanation for desired outcomes.<sup>5</sup> The model of promise was gradually replaced with that of the exchange, an outcome which suited the interests of a rising commercial class.<sup>6</sup> Promise was largely relegated to the more limited role of explaining contracts (said to be formed by an exchange of conditional promises) or dealing with exceptional cases (the promise of reward), though it held on in at least one of the jurisdictions explored below as a discrete obligation, if not one which rivalled contract in importance. The demise of promise seemed almost complete by the 20<sup>th</sup> century, with the rise of reliance theories which sought to undermine the importance of acts of the human will, of which promise was a prime example, and to replace them with the notion of reliance as the normative basis for obligations.<sup>7</sup>

The above juridical development deprived European private law of the most obvious explanation for the nature of many transactions. It is a fact that, while we normally expect to receive something in exchange for what we give, there are also many occasions on which we undertake duties without being able to compel a counter-performance from anyone. For such transactions, the best explanation is that they constitute a unilateral promise, such a promise being a declaration by which one party commits itself to some future performance in favour of another, and to which

<sup>1</sup> Aristotle equates truth-telling with promising: see *Nicomachean Ethics* iv, vii, 1127a–1127b.

<sup>2</sup> There is an abundance of references to promise keeping in both the Old and New Testament, as well as references to the related (though not equivalent) practice of oath-making. There is frequent citation of scriptural references to promises by the Natural Law School in their writings.

<sup>3</sup> Of primary importance are certain passages in both the *Decretum* (including D.23 c.6, C.22 q.2 c.14, and C.22, q.5, c.12) and the *Decretals* (including Sext 2.2.3, Sext 2.11.2, and Gregor IX, 1.35.1, 1.35.3) enjoining adherence to promises and founding ecclesiastical jurisdiction in promissory cases.

<sup>4</sup> See especially the writings of the late Scholastics Leonard Lessius, Luis de Molina, Thomas Cajetan, and Franciscus Connanus.

<sup>5</sup> See D Hume, *A Treatise of Human Nature* (Printed for John Noon, London 1739–1740) III,ii,5.

<sup>6</sup> The replacement of promise by contract as the central obligation can probably be traced to the scheme of Samuel Pufendorf, of the Northern Natural Law School: see the treatment of both contract and promise in his *Elementorum Jurisprudentiae Universalis* (at I,xii) and his more famous *De Iure Naturae et Gentium* (III,iv f).

<sup>7</sup> See PS Atiyah, *Promises, Morals and Law* (Clarendon Press, Oxford 1981), *passim*, and *Essays on Contract* (Clarendon Press, Oxford 1986) especially ch 2.

commitment it binds itself as a result of that declaration alone. All legal systems wish to recognize, in some types of circumstance, the efficacy of such unilateral promises, but they often do so by forcing promise to wear the borrowed clothing of contract. This not only distorts a proper understanding of contracts, but it displays a lack of honesty about why liability is being imposed, for the reality is that it is being imposed because the promisor has unilaterally bound himself by his declaration of will to undertake a specific performance. Nothing else is needed by way of explanation, and attempts to explain liability by reference to fictional acceptances of such promises, or by an assertion that it is detrimental reliance which is being protected, are an unhelpful and misleading addition. That at least is the thesis advanced here, though it is freely admitted that adoption of such a thesis would cause most European legal systems some degree of realignment, especially those with a requirement of mutual consideration for contracts.

In advancing this thesis, it is proposed to look at three European legal systems, and to consider to what extent they recognize the unilateral promise and give effect to it explicitly, rather than as a supposed or fictional contract. One system has been chosen from each of the civilian, Common Law, and mixed legal system families, namely Germany, England, and Scotland. A brief general survey of the attitude of each to unilateral promise is offered, followed by an analysis of how each system deals with six different types of transaction which it is possible to class as promissory in nature, those being firm offers, options, pre-contractual undertakings concerning the contractual bidding process, promises of reward, renunciations of contractual rights, and donation. Reference will also be made at various points to the Draft Common Frame of Reference and how it treats some of these types of transaction.

As a final preliminary remark, something more must be said on the terminology to be adopted in the analysis that follows. A unilateral promise has already been defined above. What makes such a promise unilateral is that it is constituted by the act or declaration of will of one party alone, this making it a type of unilateral juridical act (or unilateral legal transaction). This contrasts promise with contract, where the acts of will of at least two parties are required to constitute the contract, this making all contracts bilateral juridical acts or transactions. A unilateral promise is also necessarily unilateral in the further sense that it imposes duties on only one party, the promisor. Another way of expressing this feature of unilateral promise is to describe it as gratuitous: the promisor is undertaking to perform his duty without any reciprocal duty being imposed on the promisee. A contract, by contrast, may (in those systems which do not require mutual consideration) impose a duty (or duties) on only one party, or on both. In this sense, contracts may be styled unilateral or bilateral, or preferably gratuitous or onerous (in order to avoid confusion with the use of the terms unilateral and bilateral to describe the number of parties required to constitute the act). Thus, a contract which obliges only one party to perform something in favour of the other is a bilateral juridical act, but a gratuitous (or unilateral) contract.<sup>8</sup> As will be seen in the

<sup>8</sup> The distinction between unilaterality and bilaterality, both as describing the nature of the juridical act as well as the number of parties upon whom duties are imposed, is widely recognised in civilian systems, as well as in mixed systems such as South Africa and Louisiana. See, for instance, the Louisiana Civil Code, which has provisions relating to juridical acts (art 28) as well as to defining types of contract, including unilateral contracts (art 1907), bilateral contracts (art 1908), onerous contracts (art 1909) and gratuitous contracts (art 1910).

following discussion, some systems which do not generally recognize the validity of a unilateral promise nonetheless conceive of a role for unilateral juridical acts other than obligation creating ones as a way of effecting certain transactions having a unilateral nature.

## II. THE GENERAL APPROACH OF GERMAN, ENGLISH AND SCOTS LAW TO PROMISE

With the wider European legal history in mind, and with definitional matters dealt with, a general survey of how the three legal systems in question treat promise will be useful.

In German law, contract is the way by which parties may voluntarily enter in to an obligational relationship (*'ein vertragliches Schuldverhältnis'*), as opposed to being placed under such a relationship by virtue of the law (as is the case with the obligations of delict, unjustified enrichment, and *negotiorum gestio*). A contract is formed by the declarations of will (*'Willenserklärungen'*) of two or more persons: without such declarations of the parties a contract cannot be constituted as a valid legal transaction. That is not to say that a contractual relationship can never be affected by a unilateral legal transaction, for it may: rescission of contract for mistake, or termination of a sale of goods contract for non-conformity of the goods, for instance, are both valid juridical acts constituted by the act of will of only one party. But that type of unilateral juridical act cannot create a contractual relationship to begin with.

It will be obvious that in such a scheme there is little evident room for the unilateral promise. Yet German law very nearly took a different course when the German Civil Code (BGB) was promulgated in 1900, as one of the leading drafters of the contract provisions of the Code, Franz von Kübel, wanted unilateral promise to be generally recognized in the Code. Von Kübel's opinion did not prevail, however, and during the drafting of the BGB unilateral promise was relegated to an exceptional explanation for certain unusual types of act which could not be explained in any other way. The clearest example is the public promise of reward, which, as is explained more fully below, is classified in §657 BGB as a type of unilateral promise. The opportunity was, however, lost for a greater role for promise in German obligations theory. Despite this lost opportunity, as will be seen below, because offers are in general irrevocable in German law and there is no requirement of mutual consideration, German law is able to give binding contractual effect to some undertakings which the Common law struggles to explain or cannot do so. For that reason, German Law may be placed somewhere in the middle of the spectrum of respect for, and honesty regarding, promissory liability.

English law has the greatest difficulty of the three systems studied in recognizing unilateral promises. The doctrine of mutual consideration means that both a unilateral promise and a gratuitous contract are *prima facie* invalid in English law. This difficulty can be elided if a party commits a unilateral declaration to benefit another to deed form, thereby giving the declaration legal force, but this is a somewhat cumbersome method and not one easily applicable (if at all) to some of the potentially promissory circumstances discussed below. An increasing willingness to find consideration demonstrated in esoteric and fictional ways, a judicial willingness in some cases simply to overlook the requirement of consideration, and use of the artificial device of the 'unilateral contract' (a species of unilateral promise by another name), further alleviate the problem posed by the consideration rule. English law is nonetheless compelled to treat

all voluntary obligational transactions as contracts, no matter how unilateral their nature, even the promise of reward. The result is an awkward forcing of unilateral undertakings into ill-fitting contractual clothing. Overall, the attitude of English law to unilateral promises may fairly be described as placing it at the hostile end of the promissory spectrum, a somewhat lamentable characterisation for a system whose contract law developed partly out of the promissory action of *assumpsit*.<sup>9</sup>

Scots law is the odd man out in the European legal tradition. Alone of European systems, it recognizes unilateral promise as a separate species of voluntary obligation, not merely as some sort of unusual, modified contractual liability. Scottish legal development was heavily influenced by the canon law's enforcement of promises, as the Scottish civil courts took over ecclesiastical jurisdiction from the church courts in the 16<sup>th</sup> century, thereby absorbing the rule on enforcement of unilateral promises into the civil law.<sup>10</sup> Though there is a requirement of subscribed written documents for non-commercial promises, promises undertaken in the course of business are binding without any specific legal form.<sup>11</sup> As will be seen below, the recognition of genuine unilateral promissory liability makes it much easier for Scots law to clothe certain transactions in a legal form which most closely mirrors their nature as unilateral undertakings. For this reason, Scots law must be placed at the end of the spectrum giving the greatest respect to promissory liability. It is suggested that its solutions to some of the circumstances analysed below bear some consideration by other jurisdictions as a possible model for future development of the law.

Having sketched the general approach to unilateral promises of the three systems, it is proposed to consider six specific instances of transactions having a unilateral character to see how the three systems cope with explaining liability in each case.

### III. SPECIFIC FACT SITUATIONS WITH A POTENTIALLY UNILATERAL PROMISSORY ANALYSIS

#### A. The Firm Offer

By a firm offer is meant one which the offeror has bound himself to keep open for a specified period of time. Consider the following example:

*A* offers to provide *B* with certain services at a certain price. *A* states clearly that 'my offer is open for acceptance until 5pm on Friday.' *B* goes away and, on the basis of *A*'s offer, submits an offer of his own to *C* in which *B* offers to provide certain services to *C* (which will incorporate some of *A*'s work). *B*'s offer is accepted by *C* on Thursday afternoon. Knowing that the contract with *C* is secure, *B* is about to accept *A*'s offer when *A* withdraws it. *Quid juris?*

In such a case, German law would create in effect, if not explicitly in name, a unilateral obligation to keep the offer open: the offer, though it remains a proposal of terms and does not give rise to a contract unless accepted, cannot be withdrawn during the period for which *A* stated it would remain open.<sup>12</sup> The effect produced by the

<sup>9</sup> For the history of rise of the action of *assumpsit*, including its transformation from promissory to contractual nature, see D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, Oxford 2001) ch 7.

<sup>10</sup> See further W D H Sellar, 'Promise' in K Reid & R Zimmermann (eds), *A History of Private Law in Scotland* (OUP, Oxford 2000) vol 2, ch 10.

<sup>11</sup> Requirements of Writing (Scotland) Act 1995, s1(2)(a)(ii).

<sup>12</sup> See §145 BGB, together with §148 (concerning time limits).

default position in Germany, out of which an offeror can opt, is the same as the effect produced by the optional position in Scotland. Unlike Scots law, however, the German law does not explicitly employ the language of a unilateral promise to achieve this effect, §145 BGB simply stating that the offer 'binds' the offeror (the offeror is '*an den Antrag gebunden*') without telling us what the nature of the binding is (clearly it cannot be a contractual binding, as there is no contract yet). That it ought to be seen as a genuine unilateral binding effect is supported by what von Kübel intended to be the position for offers in the BGB: he headed his submission to the first drafting Commission of the BGB on the topic of contractual offers with the words 'The unilateral promise as grounding the obligation to keep one's word (contractual offer)'.<sup>13</sup> His proposal that offers be generally binding was accepted, giving rise to §145.

English law resolutely refuses to give effect to the stated wish of *A* and any expectations of *B*, a position which is troubling both for those who adhere to will based theories of contract law as well as for those who support reliance based theories. Unless *A* has received something for his undertaking to keep his offer open, he is not bound to it. Thus the perennial problem of consideration raises its head, a doctrine which refuses to concede that a party might conceivably demonstrate seriousness of intent without receiving something in exchange for its promise. The result in the case of the firm offer is clearly absurd, and to its credit US Common Law has developed to apply the doctrine of promissory estoppel to at least give *B* a right to damages in the circumstances of the stated example.<sup>14</sup>

In Scotland, as in England, offers are in general revocable until accepted. But in Scotland an offeror can opt to make the offer binding for a stated time simply by specifying, as in the example, a clear time limit for acceptance. By so doing *A* is treated as having made a binding unilateral promise that it will not revoke the offer until the stated time. *B*, as the recipient of such a promise by *A* to keep the offer open, can enforce this promise by accepting the offer within the time limit, *A*'s withdrawal of the offer therefore being ineffective. Scots law thus gives effect to the clearly stated intention of the offeror to bind himself unilaterally, doing so not by changing the default nature of the offer from a mere proposal of terms, incapable itself of giving rise to any obligations, to something itself binding, but by attaching to the offer an additional obligation constituted by the unilateral promise. This has the desired effect of making the offer binding, though those from outside the Scottish legal system might find the analysis of a separate promise to keep the offer open a somewhat convoluted approach.

In assessing the relative attractiveness of these different approaches, it is suggested that either the Scots or the German position is preferable to that of the Common Law. Other than the reason of a continued, unquestioning loyalty to the requirement of consideration, there seems no good reason not to hold a party to an undertaking that it binds itself to keep an offer open for a stated period. As for model contract law, the approach of the Draft Common Frame of Reference (DCFR) in relation to the example

<sup>13</sup> This is my own translation of von Kübel's original German text, which reads: 'Das einseitige Versprechen als Grund der Verpflichtung zum Worthalten (Vertragsantrag)' (von Kübel, in Werner Schubert (ed), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuchs, Recht der Schuldverhältnisse*, (De Gruyter, Berlin 1980) vol 3, s 1145 f).

<sup>14</sup> See the decision of the California Supreme Court in *Drennan v Star Paving Company* 333 P 2d 757 (Cal 1958).

given above seems to come closest to the Scots approach: the default rule in the DCFR is that an offer is revocable until acceptance is despatched,<sup>15</sup> but a revocation is ineffective if the offer fixes a stated time for its acceptance.<sup>16</sup> However, like the German law, the DCFR does not explicitly use the term 'promise' or 'unilateral promise'. The language used avoids describing directly the nature of the obligation the offeror is under, by instead talking of the revocation being 'ineffective' rather than describing the offer as being binding. The provisions of the DCFR, while thus not explicitly promissory in nature, do achieve a unilateral binding effect.

### B. Options

There is no single way to define the concept of an option. To make the term meaningful, however, it must be taken to signify more than just the right of someone who is in receipt of a revocable offer to accept it, otherwise option would mean no more than offer<sup>17</sup> and *vice versa*. One could call a firm offer an option, because such an offer gives the offeree an identifiable right, rather than just the liberty, to accept the offer. On such a view, in German law all offers would, by default, be classed as options, because they give the offeree a right to accept the offer enforceable against the offeror if the offeror tries to revoke the offer<sup>18</sup> (though, in fact, German law does not call an irrevocable offer an option). For present comparative purposes, a fairly inclusive view will be taken of the concept of an option, it being understood as:

a right granted by *A*, either by way of firm offer, contract, or unilateral promise (but not by revocable offer) which confers upon *B* a power either to compel *A* to enter into a further contract with *B* or else to confer some other benefit upon *B*.

Under this definition, an option could be the result of a bilateral juridical act (if arising as the result of the declarations of intent of two parties) or a unilateral juridical act (if arising only as the result of one party's declaration of intent).

With the above definition in mind, the following example may be considered:

*A* grants an option to *B*, for no consideration, allowing *B* to purchase some land in *A*'s ownership, such option to be exercisable within one year of its grant. When *B* exercises the option nine months later, *A* reneges on the option. *Quid juris?*

How would the three systems we are looking at deal with this situation? German Law recognizes the validity of an option contract (*Optionsvertrag*), this being a contract in terms of which one party is given the right to require the other party to enter into a further contract with him, though no specific provision is made for such a contract in the BGB. Though the contract thus creates circumstances which may be unilateral in nature (in the sense that it may confer rights only on one party), the option may only be obtained by the usual contractual methods and not through any unilateral juridical act. If the option concerned the sale of land, it would have to comply with the provisions of §311b on land contracts and would thus require notarial authentication.

In English Law, as with the firm offer example, the principal hurdle here is the doctrine of consideration. A valid option can only arise in English law if it is given for some reciprocal consideration. Nonetheless, given the willingness of the courts to find

<sup>15</sup> II-4:202(1).

<sup>16</sup> II-4:202(3)(b).

<sup>17</sup> At least offer as conceived generally in English and Scots Law.

<sup>18</sup> §145 BGB.



ever more imaginary instances of consideration, a potential purchaser of land under an option might very well be seen as having provided consideration for the option by, for instance, instructing a survey to assess the suitability of the land for an intended purpose. In the absence of some type of consideration however, no matter how strained or convoluted it may be, a *gratis* option (such as that in the example) is clearly invalid. Where options are validly created in English law, they are conceived of a species of so-called 'unilateral contract', as they create binding duties on only one party. As unilateral contracts they are said to transform into bilateral or synallagmatic contracts once the option is exercised.<sup>19</sup> So English law, in trying to describe a unilateral obligation, has to give it the clothing of contract in order for it to be accommodated within the Common Law obligational model.

In Scots Law, the nature of an option can be that of a firm offer (which, as noted above, is an offer with a promise attached to it to keep the offer open) requiring acceptance,<sup>20</sup> or simply a promise, plain and simple, not requiring any acceptance (though still evidently requiring to be exercised by some sort of notification). Scots Law thus has no difficulty with saying that an option can be constituted by a unilateral promise, indeed the reported cases seem to indicate a preference for such a promissory view. If the option relates to a real right in land, it would have to be in subscribed writing,<sup>21</sup> but where the option is in promissory rather than contractual form, only the promise itself is required to be in signed writing and not the exercise of the option.<sup>22</sup>

What can be said of the approach of the three systems? It of course seems right to allow parties to constitute an option in contractual form if that is what they wish. But what objection can there be to allowing a party, if it wishes, to grant an option by way of unilateral promise? Especially where the option is gratuitous in nature, unilateral promise seems an idea vehicle for its constitution. Naturally, if the party in whose favour the option is conceived does not wish to take the benefit of it, it is a simple enough act for it to reject it, much as a donee can reject under a donation.

The DCFR has no provision specifically dealing with options.<sup>23</sup> The assumption seems to be that they will be treated like any other type of contract, as in German law. However, the DCFR's general provision on unilateral undertakings<sup>24</sup> seems equally capable of application to an option, so that there would appear, as in Scots law, to be two possible conceptualisations of an option under the DCFR, either contractual or promissory.

### *C. Pre-contractual Undertakings Concerning the Contractual Bidding Process*

It is not uncommon for a party inviting bids for a contract to state how it will conduct the bidding process and how it will handle any bids received. If bidders discover that

<sup>19</sup> See Lord Diplock in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 (HL), 477A-B.

<sup>20</sup> For a case of an option conceived of as a firm offer see *Hamilton v Lochrane* (1899) 1 F 478 (CSIH).

<sup>21</sup> Requirements of Writing Act (Scotland) 1995, s 1(2)(a)(i).

<sup>22</sup> *Stone v Macdonald* 1979 SC 363 (CSOH).

<sup>23</sup> Though there is passing reference in IX.-1.103 to the option of a lessee to buy leased goods at the expiry of the lease, though without indicating how the nature of such an option is conceived.

<sup>24</sup> II-1:103(2): 'A valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance.'

such conditions have been broken, what recourse, if any, do they have in contract law against the party who invited the bids?

Consider this example:

*A* invites bids for 10,000 shares which it holds in a company. *A* says that (1) it will not consider bids submitted after midnight on 1 February, and (2) that it will accept the highest bid submitted before that deadline so long as it is at least £100,000. *B* and *C* submit bids before the time limit of £105,000 and £110,00 respectively. *D* submits a late bid of £112,000. *A* accepts *D*'s bid. *C* believes the shares should be transferred to it. *Quid juris?*

In this example, the German courts would be likely to hold the party inviting the bids to the highest timely offer (that submitted by *C*). That result would seem to agree with the approach of the *Bundesgerichtshof* (BGH) in a judgment from 2002 concerning an online car auction, in which the court held the seller to a commitment that it would sell to the highest bidder.<sup>25</sup> Unlike the court below it, the BGH expressed some doubt as to which party had made the offer and which the acceptance (given that the seller's 'acceptance', if acceptance it were, had been made before the 'offer' of the buyer), but it took the view that that matter didn't require a specific ruling, given that the concepts of offer and acceptance were merely two manifestations of the more fundamental idea of a *Willenserklärung* (declaration of will) and that it was clear that both parties had made such a declaration of will binding themselves to a contract of sale to the highest bidder.<sup>26</sup>

In English law, the prima facie problem for a case such as this is that *C* would seem to have no claim given that it does not appear to have a contract with *A*. However, English law, recognizing the inequitable nature of not enforcing undertakings made at the pre-contractual stage, has fashioned a solution to this problem. In a case somewhat similar to the example given, *Harvela Investments Ltd v Royal Trust Co of Canada*,<sup>27</sup> an invalid bid was struck out by their Lordships and the next highest bidder held entitled to the property concerned (a parcel of shares).<sup>28</sup> The reasoning of the House of Lords was that, when the seller indicated to the bidders that it would accept the highest bid for the shares, it was in fact making an offer to sell the shares (even if not described as an offer), an offer capable of acceptance only by one party (the highest bidder), so that when that party made its bid it was in fact accepting the offer and concluding the contract of sale.<sup>29</sup> In *Harvela*, such an offer was described by Lord Diplock as a 'unilateral contract' because it bound the party issuing it, the instant it was issued, to accept the highest bid.<sup>30</sup> That unilateral contract was said to transform into

<sup>25</sup> NJW 2002, 363.

<sup>26</sup> In fact, in a similar case from 2005, the BGH expressed the view that the seller had made the offer, and the buyer the acceptance when it submitted the highest bid: BGH JZ 2005, 464; NJW 2005, 53. <sup>27</sup> [1986] AC 207 (HL).

<sup>28</sup> The facts of *Harvela* were not quite the same as the example, as in *Harvela* what invalidated the seemingly higher bid was not its late submission but the fact that it was a referential bid, something which the House of Lords held was not permitted under the bidding process envisaged by the seller.

<sup>29</sup> This is an unusual analysis of a contract bidding process, as usually those bidding for a contract are seen as making offers, with the party inviting the bids then accepting (or not) one of them. But in such a normal case, the party inviting bids has the discretion which, if any, to choose to accept, a discretion which had been excluded in *Harvela*.

<sup>30</sup> See the speech of Lord Diplock [1986] AC 207, 224.

a bilateral or synallagmatic contract when the highest bidder submitted its bid.<sup>31</sup> It is clearly an odd kind of contract which can be formed merely by the declaration of will of one party alone, and without any clear consideration having been given for the promise (unless perhaps the time and effort expended in putting the bid together). These oddities provide the clue for concluding that what in reality the House of Lords was doing was giving effect to a unilateral promise, albeit under the guise of contractual liability. The solution is not an elegant one, but it at least represents an imaginative and equitable way of holding a party to its clearly expressed undertakings about how it will conduct a bidding process.

In Scotland, it is unlikely that, on the facts of the example given, *A*'s undertaking would be described as giving rise to a 'unilateral contract', given the existence in Scots law of an obligation of unilateral promise tailor-made to enforce unilateral undertakings. *A*'s stated conditions about the bidding process would each be seen as a unilateral promise made by *A* to each of the bidders. *A*'s promise not to accept late bids would invalidate *D*'s late bid; *A* would therefore be in breach of its promise to *C* to accept its bid, given that it submitted the highest valid bid. *C* would be able to enforce this promise judicially by asking a court to declare *C* to have contracted validly for the purchase of the shares and to order the transfer of the shares to it.

Which jurisdictional approach is best here? Should a party setting out bidding conditions be viewed as making promises, making a unilateral contract, manifesting a declaration of will to contract with one identified person, or as doing something else? Any preferred analysis ought to be able to deal with even more conceptually difficult cases than the example given above. Just such a more conceptually difficult case would be one where the party inviting bids did not bind itself to accept any particular bid. What, for instance, if the only condition stipulated by the party inviting bids was that all bids submitted on time would be considered, but not that any particular bid would be accepted, and one of the unsuccessful bidders wanted to complain about a breach of that condition, on the grounds that (it alleges) its timely bid was improperly rejected? The German approach of the BGH in the online auction case will not solve this problem, as it is in no way clear that the party inviting bids would have manifested the will to contract with the unhappy bidder even if its bid had been considered. At best, all the unhappy bidder is claiming is that it lost the chance of being awarded the contract, a lost chance which perhaps merits an award of damages. German law might utilize the concept of *culpa in contrahendo* to provide a solution here, given that the party inviting bids could be said to have culpably injured the interests of the bidder during the contract formation process.<sup>32</sup> English law would still maintain that the unhappy bidder had a contractual right to have its timely bid considered, as the Court of Appeal did in its decision in *Blackpool and Fylde Aero Club v Blackpool Borough Council*.<sup>33</sup> Though the term 'unilateral contract' was not used in the judgment in that case, it is clear that the Court of Appeal saw a subsidiary contract governing the bidding process as existing, a contract ancillary to the main contract intended to be concluded with the

<sup>31</sup> The analysis of transformation from unilateral to bilateral contract is identical to that said to apply in options contracts, the judge providing this analysis in *Harvela* being the same Lord Diplock who gave judgment in the options case of *Sudbrook Trading* (n 19).

<sup>32</sup> The previously uncoded doctrine of *culpa in contrahendo* now finds a place in the BGB, in §311(2).

<sup>33</sup> [1990] 1 WLR 1195 (CA), [1990] 3 All ER 25.

successful bidder. Again therefore, the English court used the vehicle of contract to solve the problem of the breach of an obligation having an essentially unilateral promissory nature. Scots law, in this trickier type of case, would be likely to continue to adopt a unilateral promissory analysis, so long as breach of a clearly identified promise of the party inviting bids could be said to be the source of the alleged loss of a chance.<sup>34</sup>

Breaches of conditions laid down by a party inviting contractual bids seem, in cases where breach of the condition cannot be remedied by awarding the contract to the victim of the breach, to be a clear candidate for a unilateral promissory solution. The undertakings given are unilaterally adopted by the party in question, for no consideration, and may give rise to grievances by bidders who do not end up being awarded the contract in question. To adopt a unilateral contract analysis, as English law does, is a makeshift solution, which again presses contract into service to deal with promissory problems. *Culpa in contrahendo* provides another possible solution, though the desirability of the development of a distinct field of pre-contractual liability is beyond the scope of the present investigation.

#### D. Promises of Reward

A promise of reward is a paradigm case of a unilateral promise. The party promising the reward is, from the moment its intention to do so is communicated (whether to one party or to the public at large), binding itself to pay the reward. As the declaration of will of no other party is needed to bring the promisor's duty into being, this is the very essence of a unilateral juridical act. Moreover, because the promise imposes no reciprocal duties upon the promisee(s), but merely a discretion to fulfil the condition of the reward, the obligation is also strictly gratuitous (even if the promisor has stipulated conduct for the condition of the reward which the promisor hopes will bring some benefit to the promisor if and when it is performed). The conceptual benefit of seeing such promises of reward as unilateral promises is that the obligation is properly recognized as coming into being immediately the promisor's intention to be bound is objectively communicated (rather than when accepted in some way) and that it can be enforced by a promisee even if he was unaware of the reward when he performed the stipulated conduct.

In German law, the treatment of a private offer of reward (one made to a specific party or parties) is somewhat awkward. It is not seen as a genuine unilateral promise, but might conceivably be treated as giving rise to a service contract, work contract, or contract to transact business, if accepted, each of these classifications being governed by separate provisions of the BGB.<sup>35</sup> This marks an awkward contrast with the reward

<sup>34</sup> In the *Blackpool* case the undertaking which the defendant had breached was in fact an implied undertaking, rather than an express one, a feature which might have caused difficulties for the Scots promissory analysis, given that it has traditionally been the position in Scots law that promises are construed strictly. It would thus be unusual in Scotland to imply a promise of one nature from an express promise of a different nature made by the promisor.

<sup>35</sup> For service contracts see §§611–630, for work contracts §§631–651, and for contracts to transact business §675. For a recent judgment demonstrating that an offer of reward to a specific person is also unlikely to be viewed as a donation, but rather as consideration for the offeree's efforts in trying to bring about the desired state of affairs, see BGH judgment of 28 May 2009—Xa ZR 9/08 (LG Potsdam).

offered to the public (*Auslobung*), which more sensibly and naturally is treated (under §657) as a species of enforceable unilateral promise. The only requirement is that the reward be made known by 'public announcement'; no particular form, such as writing, is specified. By contrast with the default rule in German law for offers in general,<sup>36</sup> §658 provides that, unless stated to be irrevocable, a promise of reward may be revoked until the act which is the condition for the reward is undertaken (this avoids the problem in the Common Law of the revoked reward). It is specifically provided in §657 that it does not matter if the promisee knew of the existence of the reward when he carried out the conduct which is the subject of the reward (which again marks a contrast with the Common Law view).

In English Law, a promise of reward must necessarily be treated as an offer, whether one made to a particular individual or to the public at large, though the need for communication of an acceptance in cases of offers to the public is considered to be waived.<sup>37</sup> As any resulting obligation will place an enforceable duty on the promisor alone, such offers of reward have been said to give rise to unilateral contracts in English law. The offeree comes under no duty, but has the choice, if he so wishes, of consciously performing the stipulated conduct in the knowledge that he is doing so in fulfilment of the terms of the offer of reward. This, however, means that (unlike in German and Scots law) someone who performs the conduct in ignorance of the reward cannot subsequently claim the reward.<sup>38</sup> The adoption of an offer analysis also means that, as is generally the case under English law, the offer can be revoked at any time until it is accepted by the offeree. This creates potential problems for English law: what is the position where an offeror, seeing a member of the public walking towards his house with the offeror's lost dog, shouts out the window 'I revoke my offer of reward'? The answer which has been suggested is that the offeree who begins to perform the conduct stipulated has validly accepted the offer.<sup>39</sup> This is a sensible practical solution, but the problem would be avoided by adoption of a genuinely promissory analysis.

Scots law is able to view promise of reward as an ordinary example of a unilateral promise, and not as an exceptional undertaking (as in German law). A promise of reward, whether made to the public or a specific person, can be characterized as a unilateral promise, and enforced as such. Furthermore, according to promissory doctrine in Scotland, a promise once made cannot be revoked (unless power to do so has been retained), so that the difficulties of a promisor who subsequently tries to avoid paying a reward by revoking it are avoided. On the other hand, one practical problem with a promissory approach to cases of reward is that, unless the reward is offered in the course of business, it has to be in subscribed written form in order to be validly constituted.<sup>40</sup> That would be unusual for an offer of reward, many of which appear

<sup>36</sup> Which, according to §145, cannot be revoked unless power to do so has been reserved by the offeror.

<sup>37</sup> *Carlill v Carbolic Small Ball Co* [1893] 1 QB 256 (CA).

<sup>38</sup> There is no English case clearly setting out this view, though it would seem to follow from the general principles applicable to acceptances. For an Australian case adopting this view, see *R v Clarke* (1927) 40 CLR 227 (High Court of Australia); to similar effect, see the South African case of *Bloom v American Swiss Watch Co* (1915) AD 100 (Appellate Division).

<sup>39</sup> No decision of the courts definitively sets out this view, though the comments of Denning LJ in *Errington v Errington* [1952] 1 KB 290 (CA), 295, support it. For a discussion of the issues, see E Peel, *The Law of Contract* (London: Sweet & Maxwell, 2007) 41–43.

<sup>40</sup> See Requirements of Writing (Scotland) Act 1995, s1(2)(a)(ii).

simply on photocopied notices of reward, or as advertisements in newspapers or in shop windows. This problem can be avoided if recourse is had to the English approach, and in fact, under English influence, some Scottish courts have taken just such an approach, describing offers of reward made to the public as contractual offers capable of acceptance by conduct.<sup>41</sup>

### *E. Renunciations of Contractual Rights*

The renunciation of contractual rights (as well as the transaction considered next, donation) has the added complication that, apart from being potentially classifiable as either a contract or a unilateral promise, it may be given a further possible classification of a unilateral juridical act other than an obligation creating one. This further classification is taken into account in the following discussion. A further difficulty in this field is the variety of English language terms encountered: a renunciation of rights can also be called waiver, release, discharge, remission, acceptilation,<sup>42</sup> a *pactum de non petendo*, or simply and more generically an alteration of contract. Because some of these other terms have specific meanings and technicalities in certain legal systems, the more neutral term renunciation will be used here. What is meant by this term, for the purposes of the present discussion, is an express declaration by one contracting party that he is releasing the other from a duty or duties imposed on him by the contract. There is of course the further issue of the characterisation of implied renunciations of rights, but constraints of space prevent consideration of that issue here.<sup>43</sup>

As a renunciation is conceptually a giving up or abandonment of only one party's contractual rights, it is easy to see how it might be given a unilateral, rather than bilateral, characterization. Why should my decision to lay down my rights against you need your consent, permission, or other involvement? It is, after all, an action which would seem to be of inherent benefit to you.<sup>44</sup> As such, there seems no objection to such an act being seen either as a unilateral promise (a promise not to enforce the rights in question) or simply as a unilateral juridical act by which the creditor declares that the rights in his favour are immediately renounced (which act would not be promissory, given that it would not bind the creditor to any future performance, but rather a unilateral act by which rights were presently terminated by the right-holder). The alternative view is to see a renunciation as a contractual offer, one which therefore requires an acceptance by the offeree before the renunciation takes effect. Where that alternative view is favoured this is often said to be because, as contractual rights come

<sup>41</sup> *Hunter v General Accident Corp* 1909 SC 344 (CSIH), affd 1909 SC (HL Sc) 30; *Hunter v Hunter* (1904) 7 F 136 (CSIH).

<sup>42</sup> The term is encountered in Scots law, and derives etymologically from Roman law's *acceptilatio*, which was an oral form of the dissolution of an orally constituted obligation.

<sup>43</sup> The topic of implied renunciation brings in issues of promissory estoppel or personal bar which are not the main focus of the present discussion, though promissory estoppel will be mentioned in passing in the discussion of English law.

<sup>44</sup> It has been argued that it is possible to conceive of rare cases where release of a debtor from an obligation may make the debtor worse off overall, so that he will wish to be able to refuse the 'benefit' of such a release, though it is hard to imagine what the facts of such cases might be. More conceivably, a debtor may have a moral reason for not wishing to be released from his debts, that being that he holds it consistent with honesty and good faith that he discharges in full all duties he has contracted.

into being by the consent of two or more parties, it is symmetrical to see their extinction as also, in general, requiring consent.<sup>45</sup>

In German law, §397 of the BGB sets out the general rule on renunciation of rights deriving from obligations (including from contracts).<sup>46</sup> The heading of this section is somewhat unhelpfully translated in the official Federal Ministry of Justice English version of the BGB as ‘forgiveness’, but what is meant is the extinction of debts. §397 provides that an obligation is extinguished if, by contractual agreement of the parties, the creditor either releases the debtor or acknowledges that the debt does not exist. The two methods specified thus cover both the express release of a debtor and the release which is to be implied from the creditor’s statement that he no longer considers the debtor to be under the obligation. Both methods have the effect of terminating the obligation in question, not simply of suspending the duty of performance temporarily, though there is no reason why contracting parties might not alternatively provide for such a temporary suspension by contractual agreement.

The wording of §397 appears, on the face of it, to be quite unequivocal as to the need for a contractual agreement. It has however recently been argued by one German academic, Kleinschmidt, that the apparent wording of the provision may not be as prescriptive as it first appears, and that in practice the courts assume acceptance or simply ignore the need for such.<sup>47</sup> Kleinschmidt argues that §397 is permissive rather than prescriptive: it allows for contractual renunciation, which has the effect of terminating the obligation, but does not forbid a unilateral renunciation. He further argues that, though §311(1) is rightly considered as establishing a general principle requiring a contractual route for the voluntary creation and variation of obligations, if the purpose of that provision is considered (it being designed to encapsulate freedom of contract), then it is consistent with that purpose to recognize unilateral renunciations if that is the form which the renouncing party wishes to give the renunciation. In support of this argument, Kleinschmidt points out that, under §423, an agreement between a creditor and one of a number of joint debtors can have the effect of extinguishing the whole debt, the renunciation of the debt taking effect against the other debtors unilaterally, even in the absence of their consent. If renunciation of contractual debts can effectively occur unilaterally so far as co-debtors are concerned, there would appear to be no theoretical objection to such renunciations operating in favour of a sole debtor.

Though Kleinschmidt’s position that unilateral renunciations are presently permissible under the existing provisions of the BGB is not the generally accepted view

<sup>45</sup> There must necessarily be exceptions to any policy favouring such contractual symmetry: termination for breach, for instance, is clearly an asymmetric juridical act (though even here one might assert of a sort of symmetry by virtue of the presence of the other party’s wrongful act of breach).

<sup>46</sup> There are some further more specific provisions on renunciation elsewhere in the BGB, such as §533 concerning waiver of the right to revoke a donation, §658 on waiver of the right to revoke a public offer of reward, and various provisions on the waiver of inheritance rights.

<sup>47</sup> See J Kleinschmidt, *Der Verzicht im Schuldrecht* (Mohr Siebeck, Tübingen, 2004). Kleinschmidt’s argument has generated support from the following (among others): R Zimmermann, AcP 202 (2002), 243, 270; G Schulze, in *Antwarkommentar zum BGB* (Deutscher Anwaltverlag, Bonn 2005) vol 1, §§145–147, fn 15; Hans Stoll, ZEuP 2007, 396, 398; E A Kramer, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (5<sup>th</sup> edn, Beck Juristischer Verlag, Munich 2006) vol 2, Einleitung fn 55.



of §397,<sup>48</sup> the view that it should be the formal position has been advocated by other commentators since the 19<sup>th</sup> century. If German courts are in effect permitting such unilateral renunciations, it would surely be more honest for the legal system to recognize them for what they are and to cease to force essentially unilateral acts into a bilateral contractual model.

English Law faces the problem with renunciation of rights that, since the 16<sup>th</sup> century onwards, the courts have taken the view that informal agreements to vary a contract are not valid, including variations in terms of which a creditor undertakes to renounce some or all of its rights.<sup>49</sup> The position adopted was a consequence of the doctrine of consideration: some consideration requires to have been received by the party undertaking the renunciation in order to make the act valid.<sup>50</sup> This view was upheld by 18<sup>th</sup> and 19<sup>th</sup> century courts, with the development that the courts were willing to treat even a slight benefit in the creditor's favour as valid consideration. Despite this development, the courts maintained the view that the alleged 'practical benefit' of a creditor receiving the part performance of a debt, rather than the alternative possibility of no performance at all from a financially distressed debtor, did not count as valid consideration for a renunciation of the debt.<sup>51</sup> The harsh results stemming from the requirement of mutual consideration for a valid renunciation of rights has been somewhat mitigated by the development of the doctrine of promissory estoppel, a promissory based defence which fulfils some of the functions that would be met by a properly recognized obligation of unilateral promise, but only where reliance has been placed on the promise.

In Scotland, which recognizes the validity of both contract and unilateral promise, it is in consequence possible to clothe a renunciation in either contractual or promissory form. A creditor can offer, either for some consideration or gratuitously, to release a debtor from a debt, and the acceptance of such an offer creates a binding contract (or contractual variation, depending on the intent) to that effect. Alternatively, a creditor can promise unilaterally that it will not enforce contractual rights for the future (a promise which might conceivably be interpreted not as wholly extinguishing the rights but as meaning that the promisor is merely binding himself not to enforce rights which still technically exist),<sup>52</sup> such promise being enforceable in the same way as any other valid unilateral promise. Alternatively, it is possible for a party, without undertaking any obligation to the other party (whether by way of contract or promise), simply to declare unilaterally that it is renouncing its rights in favour of another. This has the

<sup>48</sup> Opponents have taken the view that his argument stretches the plain meaning of the text of the BGB: see Volker Rieble, in J von Staudingers (ed), *Kommentar zum Bürgerlichen Gesetzbuch* (rev edn Sellier, Munich 2005) §397, fn 5.

<sup>49</sup> For instance, Sir John Comyns, *A Digest of the Laws of England* (4<sup>th</sup> edn printed for A Strachan, London, 1800), notes (127) the case of *Lynn v Bruce* 2 H Bl 317 (CP), in which a declaration had been made by A that he had, at B's request, agreed to accept from B a composition of so much in the pound upon a certain sum of money owing by B in full satisfaction and discharge of B's debt. It was held that B's promise to pay this composition was not a good consideration to support an assumpsit against B, and that 'upon an accord, which this is, no remedy lies' (per Lord Chief Justice Eyre).

<sup>50</sup> See Ibbetson (n 9) 240, and cases cited there.

<sup>51</sup> See *Foakes v Beer* (1884) 9 App Cas 605 (HL), and *Re Selectmove* [1995] 1 WLR 474 (CA).

<sup>52</sup> The latter interpretation would not strictly qualify as a renunciation of rights, but merely as an undertaking that the promisor was forbearing to exercise the rights either permanently or for some period of time.



effect of extinguishing the rights, but does not create any new obligation. Such unilateral acts of renunciation are possible in respect of both contractual and non-contractual rights.<sup>53</sup>

There seems no overriding reason why an act of renunciation of contractual rights should not theoretically be classifiable by a legal system as a unilateral juridical act, quite apart from any contractual classification which may be warranted by the facts, unless, like the Common law, a concern is professed that no one should be entitled to acquire a contractual right for no consideration.<sup>54</sup> The obvious characterization of the nature of a renunciation is as a unilateral act (whether a unilateral promise to renounce, or more simply a unilateral act having the immediate effect of extinguishing the rights), given that the consent of the other party seems a superfluous requirement.<sup>55</sup> Any concern that the party in whose favour the renunciation is conceived may not wish to take the benefit of the renunciation can be met by giving such a party a right of rejection, rather than in insisting upon an acceptance. That is the approach taken by both Scots as well as Italian law.<sup>56</sup>

#### *F. Donation*

Although not the approach of every legal system, it is possible to distinguish unilateral promise or contract on the one hand, and donation on the other. A unilateral promise or contract to transfer something gratuitously to another in the future is a juridical act which binds the donor to such future donation, and as such can be distinguished from the subsequent juridical act of transfer of the ownership of the property in fulfilment of the promise or contractual undertaking to donate. It is possible to classify the juridical act of transfer as unilateral in nature, though some legal systems choose to classify it in contractual terms, insisting that the donor's act of transfer of the thing is an offer which the donee is deemed to accept through the voluntary receipt of the thing. This, as will be seen, is the approach of German law, which consequently conceives of the transfer component of donation, as well as any preceding contract, in contractual terms.

The BGB deals with donation at §§516–534, defining it as a gratuitous disposition by which *A* enriches *B* out of *A*'s assets, a definition which focuses on the objective effect of the transaction rather than any motive of the giver (as in French law).<sup>57</sup> The wording precludes services from being the subject of donation, as well as cases where *A* is not permanently deprived of his assets (as with gratuitous contracts of mandate, loans for use, and deposit, which are dealt with elsewhere in the Code).<sup>58</sup> There must be a demonstrable loss to the donor and a demonstrable gain to the donee, though the gain to

<sup>53</sup> For instance: the right of ownership over property may be renounced unilaterally, the effect being that the property affected is held to be abandoned, ownership passing to the Crown; a right to claim damages for a delict may be renounced by unilateral act.

<sup>54</sup> A concern which looks contrived since the general recognition of third party rights in contract by virtue of the Contract (Rights of Third Parties) Act 1999.

<sup>55</sup> In the Principles of European Contract Law, a renunciation is treated as a unilateral promise of the type allowed for in art 2:107.

<sup>56</sup> Codice Civile art 1236, which provides that the renunciation does not take effect if the debtor states within a reasonable period of time that he does not wish to profit from the renunciation.

<sup>57</sup> The BGB definition of donation is found in §516(1).

<sup>58</sup> For mandate see §662 f, for loans for use see §598, and for gratuitous deposits see §690.

the donee may flow only indirectly from the donor, as occurs for instance if the donor discharges a debt owed by the donee to a third party.

As in other systems, donation may occur without any prior obligation requiring the donation (as, for instance, in the case of the unexpected or impromptu gift) or it may be preceded by a contract of donation. The act of donation itself—the gratuitous disposition—occurs either by actual concurrence of the will of the parties, or without reference to the will of the donee (*‘ohne den Willen des anderen’*, as §516(2) puts it) so long as the donor makes the disposition together with a request that it be accepted within a specified reasonable period of time, and the donation is not rejected within that time (this has the effect that the donation is deemed to be accepted by the donee, thus confirming the donative disposition). In essence then, acceptance of the donation (whether actual or implied) by the donee is always necessary. This insistence that the transfer be accepted seems an unnecessary requirement: if the concern is that donees do not become the unwilling or unwitting owners of assets which are forced on them, it would seem perfectly possible (as is the case in Scotland) to give the donee a right to reject the asset, rather than to require him positively to accept it.

An important restriction on donation in German law is that contracts of donation require notarial recording of ‘the promise’ in order to be valid,<sup>59</sup> though failure to meet this requirement can be cured by rendering performance under the donation.<sup>60</sup> This reference to ‘promise’ is telling: as the provision is designed to provide protection for the donor, it means that technically only the promisor’s declaration of donative intent requires to be notarized, even if in practice, if both parties have in any event signed a contract of donation, the declaration of both is likely to receive notarial recording.<sup>61</sup> To this extent then, there is provision in the BGB for a unilateral aspect to the donation, but it is only in the notarial requirements of the transaction.

But what would be the status in German law of the genuine unilateral promise, rather than contract, to make a donation? For example, what would be the position were *A* to state to *B* that ‘I promise to give you €1,000 on the 1st of next month’, and nothing else (specifically, no acceptance of the promise) were to happen for the present? In such a case, there would seem as yet to be no contract of donation, and thus no concluded obligation on the part of the donor. However, such a promise would be capable of being treated as an offer, which in German law would, by default, remain open for acceptance by the offeree (the intended donee) for a reasonable time (such time would, one would assume, have to expire prior to the time specified for the transfer).<sup>62</sup> When an acceptance to this offer was forthcoming, a contract of donation would come in to being, though as a donative promise to pay it would require to be in writing and to be notarised.<sup>63</sup> To non-German eyes, this seems a somewhat roundabout, and not entirely satisfactory way, of holding a donor to his clearly expressed unilateral declaration of will. A more direct means of enforcing the unilateral undertaking would surely reflect the reality of what is going on and show greater respect for the will of the intending donor. However, such a more direct route is not possible under

<sup>59</sup> §518(1).

<sup>60</sup> §518(2).

<sup>61</sup> If, however, notarisation of both parties’ declarations was required by another provisions, as for instance with land contracts, then that requirement would have to be met.

<sup>62</sup> As for the irrevocable nature of offers in German law, see §145 BGB.

<sup>63</sup> §§518(1), 780 BGB.

the BGB given the lack of a general provision recognizing the validity of unilateral promises.

Yet again, the requirement of mutual consideration creates problems for the treatment of donation in English law. A promise to gift something will be unsupported by consideration given the gratuitous nature of the gift, and therefore a bare promise to make a donation in the future is invalid in English law. However, the English courts have held that consideration may be constituted by even seemingly esoteric benefits, so long as they are given on condition of the promise to donate. Thus, *A*'s promise to make *B* a gift of a sum of money if *B* marries is an enforceable promise if supported by *B*'s reciprocal promise to marry, the promise of *B* being deemed good consideration for *A*'s promise.<sup>64</sup> Indeed, such a counter promise to marry has been found even where the facts seemed on their face to disclose no more than a gift made in prospect of the donee's marriage.<sup>65</sup> This allows certain promises, which in civilian systems would be treated as donation, to be enforced in English law as bargains on account of esoteric consideration. By way of exception to the general rule requiring consideration for a contract, promises of donation may be validly made in a deed, that is, in writing expressing the intention that it be treated as a deed, signed by the donor, witnessed, and delivered to the donee.<sup>66</sup> That is evidently a somewhat involved and cumbersome requirement, only likely to be used for significant donations, though it captures more clearly the unilateral nature of the promise, given that the involvement of the donee is not required in the process.

It is, of course, possible under English law simply to donate something without any prior obligation having been incurred to effect such a donation. Such a unilateral act of gratuitous transfer is not conceived of as being itself an obligation (as in the German contractual view), but simply has the effect of transferring ownership from *A* to *B*. Such an act would occur where, for instance, a birthday or wedding gift was given to someone, or money was placed in a charity collecting box.

Scotland is perhaps the jurisdiction where it is easiest to promise to donate something. That is so not simply because it recognizes a separate obligation of unilateral promise, so that someone may either contract to make a donation or unilaterally promise to do so, but also because certain types of unilateral promise may be made without any formality at all. That is the case for promises undertaken 'in the course of business'. While it might seem less likely that donations will occur in a business context, one can think of examples. For instance, a whisky manufacturer might promise to the organizers of a charity raffle to donate a bottle of whisky to the raffle, or a company might, without any prompting, promise to a sister company that it will donate to the latter certain office furniture which it no longer requires. These undertakings, most naturally viewed as unilateral promises of donation given their unilateral and gratuitous nature, would be enforced in Scots law as such; they would not be in England or Germany. As in English law, the transfer of the property itself, rather than any preceding contract or promise to donate, is viewed as a unilateral juridical act, though the donee has the right of rejection of the property.

<sup>64</sup> A position established early on, in *Joscelin v Shelton* (1557) 3 Leon 4 (KB), the earliest English judgment in which there is a reference to the concept of consideration.

<sup>65</sup> *Shadwell v Shadwell* [1860] 9 CBNS 159, 142 ER, 3 LT 628 (CP).

<sup>66</sup> The requirements for a valid deed are found in the Law of Property (Miscellaneous Provisions) Act 1989, s 1.

It will be appreciated from the above discussion that the three systems take different approaches to donation. Scotland reserves a contractual analysis for any obligation to effect the donation, while German law applies such a contractual analysis to the transfer also. English law requires some nominal consideration for a contract of donation, the other two systems do not. Only in Scotland can someone unilaterally promise to make a donation: German law would manage to give effect to such a promise only if the offeree accepted the (usually irrevocable) offer within a reasonable time, but English law would not give legal effect to such a bare promise at all. All three systems conceive of donation as occurring only with the consent of the donee, though in Scotland this is by virtue of giving the donee a right to reject the donation, rather than by requiring an acceptance, either express or implied, by the donee. As for the DCFR, though its primary conception of donation is as a contract,<sup>67</sup> it also provides that a donation may validly occur by way of unilateral undertaking,<sup>68</sup> an approach which mirrors the alternatives available in Scotland.

#### IV. CONCLUSIONS

The simple conclusion to be drawn from the above study is that legal systems must stop forcing unilateral promises into contractual models, as doing so distorts the reality of those unilateral undertakings. The law no longer calls unjustified enrichment 'quasi contract'; similarly, it ought to stop treating unilateral promise as 'quasi contract' by forcing promise to wear contract's borrowed clothing. We ought to recognize, as the Natural lawyers and Scholastics did in centuries past, that unilateral promises merit being enforced in their own right as much as contracts.

Although it might seem that, for the Common Law, an acceptance of this view would require a fundamental realignment of the law of obligations, including discarding the doctrine of consideration as the sole method of demonstrating seriousness of intent, such a realignment is more radical in theory and appearance than it would be in practice. It has been seen that English law already enforces unilateral promises in many of the cases where German law and Scots law do so too, recognising that the imperative of justice mandates the adoption of some solution. Though the solution often has to be dressed up as contractual in nature, the totality of these instances of unilateral liability, taken together with an ever greater willingness of the courts to discover consideration, suggest that it would not be such a dramatic change for English law to move from its current position that unilateral obligations are not enforceable (subject to some exclusions) to the directly opposite view.

For German Law, acceptance of the approach promoted here would entail using the already recognized but limited cases of unilateral obligation, such as the public offer of reward, as the basis upon which to build a more generally recognized category of unilateral obligation, as von Kübel had originally hoped would be the case. Doubtless this would involve changes to the text of the BGB, but such changes would surely be consistent with the idea of the freedom of the will which is encapsulated in §311(1) BGB, as well as the concept of a unilateral juridical act which already exists in the Code.

<sup>67</sup> Book IV.H.

<sup>68</sup> IV.H.-1:104.

That the suggestion of explicitly and generally enforcing unilateral promises has merit seems to be supported by the fact that under both the PECL and the DCFR unilateral promises are to be enforced where the promisor intended to undertake liability. The PECL provide that a 'promise which is intended to be legally binding without acceptance is binding',<sup>69</sup> and state that the Principles are to apply with 'appropriate modification' (whatever that means) to such promises.<sup>70</sup> Similarly, the DCFR specifically provides, alongside the provision that a contract binds the parties,<sup>71</sup> that a 'valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance'.<sup>72</sup> These model law provisions provide a clear base from which to argue that the types of scenario discussed above could be seen as instances of unilateral promise, though the constraints of space prevent the pursuit of a deeper analysis of the potential of the PECL and DCFR in this respect.

We must restore to promise the central role which it once had in the private law of the *ius commune*. It had such a central role because it was rightly recognized that making promises is as much a fundamental aspect of human interaction as the bargained for contract. To dress promises up as contracts, and in so doing to fail to recognize unilateral promise-making for what it is, is juridically dishonest and leads to the placing of forced and inappropriate constructions on many transactions. A promise was once described as 'that which is simple and pure'.<sup>73</sup> We should seek in the new European *ius commune* simple and pure legal solutions to give effect to those unilateral promises which are seriously intended to have legal effect.

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<sup>69</sup> PECL art 2:107.

<sup>71</sup> II-1:103(1).

<sup>73</sup> J Dalrymple (Viscount Stair), *The Institutions of the Law of Scotland* (Edinburgh and Glasgow University Presses, Edinburgh and Glasgow 1981, being a reprint of the 2nd edition of 1693) I.x.4.

<sup>70</sup> PECL art 1:107.

<sup>72</sup> II-1:103(2).

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